IN ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT, HOW SHOULD STATE COURTS INTERPRET THE COMMON LAW?

The Act in and of itself "constitutes the sole and supreme law as to the subjects upon which it touches." [1] It may not be pieced out by "resorting to the local statutes of the state." [2] The common and statutory laws are here on a parity, both being "rules of conduct proceeding from the supreme power of the state." [3] Congress having acted, state laws to the extent that they "cover the same field are superseded, for necessarily that which is not supreme must yield to that which is." [4] When the laws of Congress are to be construed "the rules of the common law furnish the true guide." [5] The Act uses the word "negligence" without defining it. Before the Act it was settled that in dealing with questions of negligence the federal courts would not follow the state court decisions, but would exercise an *independent* judgment as to what constitutes negligence.[6]

The probabilities are that a majority of cases under the Act will be tried in the state courts and so receive the impress of the Federal Supreme Court upon writ of error only. This situation presents the subject-matter of this article as one of some significance. Notwithstanding the suit is one arising out of a federal statute exclusive in its sphere and operation, the power to review being controlled by § 237 of the Judicial Code, the court may not be required to examine further than to ascertain "whether plain error was committed in relation to the principles of general law involved," [7] but it will review and decide those questions which "in their essence involve the existence of the right of the plaintiff to the existence of the right of the plaintiff to recover * * * and the right of the defendant to be shielded from re-

1. So. Ry. Co. *v.* Jacobs, 116 Va. 189.
2. Michigan C. R. Co. *v.* Vreeland, 226 U. S. 54.
3. Western U. T. Co. *v.* Commercial Co., 218 U. S. 416.
4. Mondou *v.* R. Co., 223 U. S. 1.
5. Rice *v.* Ry., 66 U. S., at p. 374.
6. Gardner *v.* R. Co., 150 U. S. 349; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368.
7. Yazoo, etc., R. Co. *v.* Wright, 235 U. S. 376; So. Ry. Co. *v.* Bennett, 223 U. S. 80.

sponsibility," which includes questions of law under the Act touching the imputations of negligence, especially when presented upon the contention that there is no evidence of negligence, unless the asserted right is so wanting in substance as to be frivolous.[8] So in the last analysis and from a practical standpoint, the views of the state courts are to be reckoned with.

Whether the proof shows "facts necessary to establish liability under the federal law" presents a federal question.[9] When there is presented a federal question it is "to be determined under the general common law, and, as such is withdrawn from the field of state law or legislation."[10] It may then be safely asserted that what constitutes negligence under the Act presents a federal question. Inasmuch as the Act does not define negligence, etc., we must look to the common law. But to what common law, that of the United States, or of the states? Grant that generally there is no common law of the United States, may there not be, with respect to interstate transactions which by Congressional action have been withdrawn from the realm of state action and control, a common law of the Federal Union? May the *United States* be not considered as a separate entity distinct from the states comprising the union for this purpose? In commenting on the statement that there is no common law of the United States distinct from the common law of the several states, the Supreme Court, in Kansas *v.* Colorado,[11] said:

"Properly understood no exception can be taken to declarations of this kind * * *. But it is an entirely different thing to hold that there is no common law in force throughout the United States."

The subject-matter of the suit arises out of and depends upon a federal statute, so that the questions involved arise under the laws of the United States, which are declared to be the supreme law of the land, and which are therefore superior to the laws of the states that compose the Union. Where a federal question is to be passed upon there should be no doubt of the law to be ap-

8. Seaboard, etc., Ry. Co. *v.* Padgett, 236 U. S. 668.

9. St. Louis, etc., Ry. Co. *v.* McWhirter, 229 U. S. 265; Central, etc., Ry. Co. *v.* White, 238 U. S. 507.

10. Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657.

11. 206 U. S., at p. 96.

plied: it is the law of the United States in the sphere of its sovereignty; the law of its own government. That the laws of the United States shall be ultimately and finally construed by the courts of any other government is a proposition not seriously to be considered.

"If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen (48) independent courts of final jurisdiction over the same causes, arising under the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."

So wrote Hamilton in the "Federalist." If it be an accepted principle that every government ought to possess the means of executing and interpretating its own laws by its own authority, it will follow that the "Head and Front" of the Federal Union must have the final and determinative word upon an act of that Union's legislative body, dealing with a subject in a sphere where the Federal Union is supreme. Of what avail will it be to withdraw by Congressional action the relation of an interstate carrier to its interstate employee from the realm of state action and control, yet leave to those states the opportunity and power to finally determine what those rights and duties are, save in those respects where the Act speaks its own interpretation. Give me the right to interpret a law by which I am to be bound, and I care not who makes it.

Under the Carmack Amendment the liability of the initial carrier is limited "to some default in its common law liability." In Adams Ex. Co. *v.* Croniger,[12] the court says: "To hold that the liability therem declared may be increased or diminished by local regulations or local views of public would either make the provisions less than supreme or indicate that Congress has not shown a purpose to take possession of the field. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rules which led to the amendment."

Before Congress had shown a "purpose to take possession of

12. 226 U. S. 491.

the field" and when the right of the federal courts to pass upon questions of negligence depended upon the adventitious circumstance of diversity of citizenship, the national aspect of the subject was recognized. In the Baugh case [13] where the question was whether the Supreme Court should adopt the state court's interpretation of the common law as to who were fellow-servants, or should exercise an independent judgment, the court observed: "The question is essentially one of general law. * * * It is a question in which the nation as a whole is interested. It enters into the commerce of the country. * * * The lines of this very plaintiff in error extend into half a dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations and duties subsisting between it and its employees change at every state line?" It may be admitted that prior to the Act, there was no federal law of negligence, and that the federal courts applied the law of negligence as a part of the law of the state where the injury occurred. This statute for the first time created a substantive federal right in the employee, distinct from the right theretofore given him by the law of the state. The system of federal liability created by the Act is exclusive of the laws of the states upon the subject, which means that it is exclusive of the grounds of liability available to the employee under the state law, whether statutory or common, and of the grounds of defense afforded by the law of the state to the carrier. If it cannot be "pieced out" by reference to state statutes, why should it be "pieced out" by the adoption of the common law of the states? There is for this purpose no distinction between the two.[14] If "a substantive right or defense arising under the federal law cannot be lessened or destroyed by a rule of (state) practice" [15] why shall the common law of the state have that effect when a recovery cannot be "had under the common or statute law of the state?" [16] Is it not then necessary as well as proper that there be created a federal law of negligence? It matters little whether it be created through the establishment of a law of negligence

13. 149 U. S. 368.
14. Wes. U. T. Co. *v.* Commercial Co., 218 U. S. 416.
15. Norfolk, etc., R. Co. *v.* Ferrebee, 35 Sup. Ct. Rep. 781.
16. Wabash, etc., R. Co. *v.* Hayes, 234 U. S. 86.

distinct and separate from the common law of the states, or whether it be created by yielding to the Federal Supreme Court the authority to exercise its own and independent judgment of what the law of negligence is in so far as it arises out of a matter of national import. In North Carolina as to railroads, assumption of risk as a part of the common law is abolished by statute. To what law did the court look in Horton's case,[17] when it held that such defense was open to the carrier?

In Missouri, when the injury is caused by the negligence of the defendant, such defense is not open to the carrier. This rule has been applied to a case under the Act.[18] This decision nullifies the decision in the Horton case. Yet if the common law of Missouri is to furnish the guide, such must be the result.

In the Horton case, the carrier contended that in applying the principles of the assumption of the risk the common law and not the statute law or decisions of the State of North Carolina should be the guide. This contention was sustained, the court saying: "The adoption of the opposite view would, in effect, leave the several state laws and not the Act of Congress to control the subject-matter."

The case of Central Vermont Ry. Co. *v.* White,[19] came up upon a writ of error to the Supreme Court of Vermont. One of the questions decided was that the rule of the federal courts that the burden of proving contributory negligence was on the defendant was to be followed, although in Vermont it was on the plaintiff. It was pointed out in the opinion that the "federal courts have enforced that principle in states which hold that the burden is on the plaintiff," and that "Congress, in passing the Federal Employers' Liability Act, evidently intended that the federal statute should be construed in the light of these and other decisions of the federal courts." Is it not a reasonable conclusion that the same view will obtain as to those federal cases holding that upon questions of negligence the federal courts exercise an independent judgment?

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17. 233 U. S. 492.
18. Fish *v.* Chicago, etc., R. Co., 172 S. W. 340.
19. 238 U. S. 507.

The Supreme Court of North Carolina, in Gray's case,[20] and in Saunder's case,[21] held that the law of the state controls The same view obtains in Kentucky.[22] The case is criticised in 78 Central Law Journal 109.

The thirty-fourth section of the original Judiciary Act has no bearing here, it having been early held that decisions of the state were not "laws" within the meaning of this section.[23]

Deference to state decisions will create a conflicting body of precedents and destroy uniformity of decision under the Act, so that the rights of the parties will depend upon the forum in which the injury happened to occur. On the other hand, should it be left to the Federal Supreme Court to exercise an independent judgment as to what the law is, a uniform body of precedents unvaried by the state in which the cause of action originates will in time form the nucleus of a general and uniform body of law, to which the state courts as well as the lower federal courts may gradually conform, thus leaving the value of the cases finally determined by the state and lower federal courts to be tested in the light of the principles enunciated by the Supreme Court. In deciding what the common law may be, the Supreme Court will resort to the same sources of information as are open to the state courts, and the evidence of the law where the state courts must seek it, viz., in the "accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes;" the inquiry being what is the rule of the common law, and not what the state decisions say it is. For precedents do not constitute the law; they serve only to illustrate principles.

It is the duty of the Federal Supreme Court, which it may not renounce, to form independent opinions and to render independent judgments upon questions of law and right under the Constitution and laws of the nation.[24] Every interstate employee who has the right to prosecute, and every interstate employer who

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20. 167 N. C. 433.
21. 167 N. C. 375.
22. Helm *v.* R. Co., 156 Ky. 240.
23. Swift *v.* Tyson, 16 Pet. 1.
24. Cohen *v.* Virginia, 6 Wheat. 264.

has the right to defend a suit under the Act, has also the right to the independent opinion of that court upon every determinative question of law which is presented for its consideration. Past doubt, what is negligence, i. e., what will give or withhold the damages allowed by the Act, is a determinative question of law arising under the Act.

The alternative is to place the supreme judicial authority of the sovereignty enacting the law which gives the right in the absurd and inferior position of merely ascertaining whether the courts of another sovereignty have correctly applied their own particular and peculiar view of the law.

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